

April 28, 2023

Via ECF

Hon. Frederic Block
United States District Court
225 Cadman Plaza East
Brooklyn, NY 11201

Re: US v. Timothy Martinez
20-cr-98 (FB)

Dear Judge Block:

With respect to the government's request to charge of April 27, 2023, I would respectfully suggest that the suggested language for REQUEST NO. 2 (Counts One and Two: Sexual Exploitation and Attempted Sexual Exploitation of a Child) lacks a required explanation of one of the elements of the charge.

As the text indicates, § 2251(a) contains a specific intent element: the government is required to prove that production of a visual depiction was a purpose of engaging in the sexually explicit conduct. *See, United States v. Lebowitz*, 676 F.3d 1000, 1013 (11th Cir.2012). "It is simply not enough to say 'the photo speaks for itself and for the defendant and that is the end of the matter.'" *United States v. Crandon*, 173 F.3d 122, 129 (3d Cir.1999) (discussing the purpose requirement in the related cross-reference under 131 U.S.S.G. § 2G2.1(c)(1)). That is, a defendant must engage in the sexual activity with the specific intent to produce a visual depiction; it is not sufficient simply to prove that the defendant purposefully took a picture. Courts do not require that a defendant be single-minded in his purpose to support a conviction under § 2251(a). *See, e.g., Lebowitz*, 676 F.3d at 1013; *United States v. Morales-de Jesus*, 372 F.3d 6, 21–22 (1st Cir.2004); *see also United States v. Cox*, 744 F.3d 305, 309 (4th Cir.2014) (considering "purpose" in the context of the application of a cross-reference under § 2G2.1(c)(1) of the sentencing guidelines governing production of some child pornography offenses). *U.S. v. Palomino-Coronado*, 805 F.3d 127 (4th Cir. 2015).

As such, we respectfully suggest that the government's proposed language is insufficient for this charge.

Thank you for your consideration.

Respectfully submitted,



Peter E. Brill